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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-922

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONER CHRYSLER CORPORATION

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TABLE OF CONTENTS

		Page
I.	The Court's Decision In This Case Should Accommodate The Private Interests Of Businesses Which Furnish Trade Secrets And Confidential Commercial Information To The Government	1
II.	The Legislative History Of The FOIA And The 1974 Amendments Shows That Exemption 4 Was Intended To Assure The Confidentiality Of Trade Secrets And Private Business Information	10
A.	THE 1967 LEGISLATIVE HISTORY SHOWS THAT CONGRESS INTENDED EXEMPTION 4 TO BE APPLIED IN A MANDATORY FASHION	11
B.	THE LEGISLATIVE HISTORY OF THE 1974 AMENDMENTS DOES NOT ESTABLISH THAT EXEMPTION 4 MUST BE APPLIED IN A PERMISSIVE MANNER	13
III.	Disclosure Of Petitioner's Documents Pursuant To OFCCP Regulations Will Violate 18 U.S.C. §1905	17
A.	AGENCY REGULATIONS DO NOT CONSTITUTE AUTHORIZATION "BY LAW" WITHIN THE MEANING OF §1905	18
B.	NEITHER 5 U.S.C. §301, THE FOIA NOR EXECUTIVE ORDER 11246 PROVIDES AUTHORITY FOR ADOPTION OF AGENCY REGULATIONS LIMITING THE APPLICABILITY OF §1905	22
IV.	18 U.S.C. §1905 Is An Exempting Statute Within The Meaning Of FOIA Exemption 3	26
V.	A Person Seeking To Enjoin Disclosure Of Trade Secrets Or Confidential Business Information Is Entitled To A Trial De Novo	28
CONCLUSION		34

TABLE OF AUTHORITIES

CASES	Page
American Jewish Congress v. Kreps, No. 75-1541 (D.C.Cir.)	10
Burlington Northern Co. v. EEOC, 17 F.E.P. Cases (B.N.A.) 1358	10
Colonial Trust Company v. Goggin, 230 F.2d 634	7
Cort v. Ash, 422 U.S. 66	29
Cross v. United States, 512 F.2d 1212	33
Crown Central Petroleum Corp. v. Kleppe, 424 F.Supp. 744	28
Dept. of Air Force v. Rose, 425 U.S. 352	11
EPA v. Mink, 410 U.S. 73	13
Exxon Corp. v. FTC, No. 76-0812 (D.C. Cir)	32
FAA Administrator v. Robertson, 422 U.S. 255	16,27
FCC v. Cohn, 154 F.Supp. 899	21,22
FCC v. Schreiber, 381 U.S. 279	25
General Services Administration v. Benson, 415 F.2d 878	18
General Dynamics Corp. v. Marshall, 572 F.2d 1211	30
Illinois Brick Co. v. Illinois, 431 U.S. 720	14
International News Service v. Associated Press, 248 U.S. 215	7
Isbrandtsen-Moller Co. v. United States, 300 U.S. 139	25
Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470	3, 4, 5, 7
Krawez v. Stans, 306 F.Supp. 2130	32
Lee Pharmaceuticals v. Kreps, 577 F.2d 610	10

	Page
National Association of Letter Carriers AFL-CIO v. Independent Postal System, Inc., 470 F.2d 265	29
National Parks and Conservation Assn. v. Morton, 498 F.2d 765	15,16,27
NLRB v. Robbins Tire and Rubber Company, 98 S.Ct. 2311	7
Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294	25
Peters v. Hobby, 349 U.S. 331	26
Polaroid Corp. v. Costle, No. 78-1133-S (D.Mass.)	8
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367	16
Regional Rail Reorganization Act Cases, 419 U.S. 102	14,15
Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1	7,29
Sears, Roebuck & Co. v. EEOC, 17 F.E.P. Cases (B.N.A.) 897	10
Sears, Roebuck & Co. v. General Services Administration, 533 F.2d 1378	26,31
St. Regis Paper Company v. United States, 368 U.S. 208	21
Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33	29
United States v. Basic Products Co., 260 F.2d 472	8
United States v. General Motors, 323 U.S. 373	4
United States v. Paine, 361 U.S. 304	15
United States v. Wise, 370 U.S. 405	17
USS-OCF-W&M v. Eckerd, No. 76-1933 (D.D.C.)	5, 12

	Page
Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216	25
Westinghouse Electric Corp. v. Schlesinger, 392 F.Supp. 1246	17
Whalen v. Roe, 429 U.S. 589	17
Zacchini v. Scripps-Howard Broadcasting, Inc., 433 U.S. 562	4
CONSTITUTION, STATUTES AND REGULATIONS	
U.S. Const. Art. I, §8, cl. 8	2
5 U.S.C. §101	26
Administrative Procedure Act	
5 U.S.C. §301	18,22,23 24,26
5 U.S.C. §706	29,30
Freedom of Information Act	
5 U.S.C. §552(a)(1)	11
5 U.S.C. §552(a)(2)	11
5 U.S.C. §552(b)(3)	*passim*
5 U.S.C. §552(b)(4)	*passim*
Government in the Sunshine Act,	
5 U.S.C. §552b, Pub.L.No. 94-409, 90 Stat 1241	15
13 U.S.C. §9(a)(2)	9
15 U.S.C. §176a	9,21
15 U.S.C. §176b	21
15 U.S.C. §1193(c)	20
15 U.S.C. §1401(e)	20
15 U.S.C. §1402(d)	20
15 U.S.C. §1418(a)(2)(B)	20
15 U.S.C. §1914(b)	20

	Page
15 U.S.C. §1944(f)	20
15 U.S.C. §1990d(d)	20
15 U.S.C. §2055(a)(2)	20
15 U.S.C. §2217	20
15 U.S.C. §2601	8
15 U.S.C. §2613	3
18 U.S.C. §216	22
18 U.S.C. §1905	*passim*
19 U.S.C. §1335	21
21 U.S.C. §331(j)	3
26 U.S.C. §6103(a)	19,20
26 U.S.C. §7213	6,19,20
26 U.S.C. §7216	20
28 U.S.C. §1491	29
33 U.S.C. §1322(g)(3)	20
42 U.S.C. §1857h-5(a)(i)	3
42 U.S.C. §263g(d)	20
42 U.S.C. §4912(b)	20
46 U.S.C. §1463(b)	20
49 U.S.C. §1681(d)	20
49 U.S.C. §1905(b)	20
Civil Rights Act, Title VII, §703(d), 42 U.S.C. §2000e-2(d)	25
Revenue Act of 1864, ch. 173, §38, 13 Stat. 223	17
Revised Statutes of the United States, §§3165-3168 (1st ed.)	18, 19, 20, 21, 22
Ill. Rev. Stat., Ch. 111½, §1001 *et seq.*	3
N.J. Stat. Ann. Title 2A, §119-5.2	3

	Page
Pub.L. 94-455, Title XII, §1202, 90 Stat. 1686 .	19
Pub.L. 94-202 §8(g), 89 Stat. 1139	20
29 C.F.R. §2.4(a)	9
29 C.F.R. §2.4(b)	9
29 C.F.R. §70.21(a)	21
LEGISLATIVE MATERIALS	
7 Cong. Rec. 4006	19
26 Cong. Rec. 6893	17
104 Cong. Rec. 6548-69	23,24,25
104 Cong. Rec. 15688	23
110 Cong. Rec. 17086	12
122 Cong. Rec. H7897	28
S.Rep.No. 93-854, 93d Cong., 2d Sess.	16
H.R.Rep.No. 1461, 85th Cong., 2d Sess.	24
H.R.Rep.No. 1497, 89th Cong., 2d Sess.	12,33
H.R.Rep.No. 92-1419, 92nd Cong., 2d Sess.	14
H.R.Rep.No. 95-1382, 95th Cong., 2d Sess.	15
Administration and Operation of the FOIA, Hearings Before the House Comm. on Government Operations, Subcommittee on Foreign Operations and Government Information, Parts 4, 5 and 6, 92nd Cong., 2d Sess.	15,16
MISCELLANEOUS	
Executive Order 11246, 30 Fed. Reg. 12319	*passim*
Executive Order 12086, 43 Fed. Reg. 46501	26
38 Fed.Reg. 3193	26
Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act	4

	Page
Dept. of Labor, "Preliminary Report on the Revitalization of the Federal Contracts Compliance Program"	8
General Accounting Office, "The Equal Employment Opportunity Program For Federal Nonconstruction Contractors Can Be Improved"	8
Restatement of Torts §757(a)	7
12A Business Organizations, Milgrim, Trade Secrets	3
Note, *The Effect of the 1976 Amendment to Exemption 3 of the Freedom of Information Act*, 76 Colum.L.Rev. 1029	28

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REPLY BRIEF OF PETITIONER CHRYSLER CORPORATION

I. The Court's Decision In This Case Should Accommodate The Private Interests Of Businesses Which Furnish Trade Secrets And Confidential Commercial Information To The Government

In our opening brief, we described the fundamental difference which exists under Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), between *private* business information which is developed and compiled at private expense and furnished to the Government for a limited regulatory purpose, and *agency* information which is produced by the bureaucracy itself. Pet. Br. 33-38. Where private documents are found to fall

within Exemption 4 because they contain trade secrets or confidential commercial or financial information, the policies underlying the fourth exemption require that those documents be withheld from disclosure.

Respondents suggest that the distinction noted by Petitioner rests on a "false dichotomy." They argue that documents such as those compiled and submitted to the Government by Petitioner and other government contractors have reached the Government "because [they have] to do with the business of government", and that such information "may tell more about the workings of government than about the status of the submitter." Arguing that the "public aspects" of such documents require that they be disclosed under the FOIA, Respondents brush aside any inquiry into, or consideration of, the private interests in maintaining the confidentiality of those documents and the harm to those interests which disclosure will cause. Resp. Br. 29.

Respondents have ignored what may be the cutting edge in this case. For, only by recognizing the distinction between *private* and *agency* records can both the legitimate interests of persons and businesses who furnish confidential business information to the Government, and the sometimes conflicting disclosure objective of the Freedom of Information Act, be accommodated. Because this distinction is at the heart of the proper resolution of the issues of this case, prior to responding to the several points raised in Respondents' brief we will focus on this subject and explain further why the decision issued by the Court ought to accommodate these important private interests.

1. Article I, Section 8, Clause 8 of the Constitution directs Congress "to promote the Progress of Science and the useful Arts." Pursuant to this mandate, Congress has

created an elaborate system of laws designed to protect trade secrets and confidential business information;[1] and the States have provided residual protection to such information in areas which Congress has not occupied.[2] These laws are intended to fulfill distinct, but complementary, functions: first, to protect the fruits of an inventor's or innovator's efforts from misappropriation or diminution in value; and second, by protecting these creative efforts for the individual, to promote innovative and inventive activities that will inevitably lead to a sounder economy and a better quality of life for all citizens. See 12A Business Organizations, Milgrim, Trade Secrets § 6.01 at 6-4 (1978).

This Court has recognized and endorsed both of these important goals. In *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974), in examining the relationship between federal patent and state trade secret laws, the Court observed that protection of trade secrets and confidential information has "a decidedly beneficial effect on society *** [because it] encourage[s] invention ... and ... prompt[s] the independent innovator to proceed with the discovery and exploitation of his invention." *Id.* at 485. Protection of such information ultimately

> "encourages businesses to initiate new and individualized plans of operation, and constructive competition results. This, in turn, leads to a greater variety of business methods than would otherwise be the case if privately developed

[1] In addition to the patent, copyright and trademark laws, Congress has specifically provided in a number of statutes for the protection of trade secrets and confidential business information. *E.g.*, 15 U.S.C. § 2613; 18 U.S.C. § 1905; 21 U.S.C. § 331(j); 42 U.S.C. § 1857h-5(a)(i).

[2] See, *e.g.*, N.J.Stat.Ann. Title 2A, § 119-5.2 (West 1969); Ill. Rev. Stat., Ch. 111½, § 1001 *et seq.* (1977).

marketing and other data were passed illicitly among firms involved in the same enterprise." *Id.* at 483; *see also Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977).

In *Kewanee*, the Court also expressly observed that the intellectual property laws were designed not only for the public good but also to protect the interests of the individual owner of trade secrets or confidential commercial information: "A most fundamental human right, that of privacy, is threatened when industrial espionage is condoned or is made profitable . . ." 416 U.S. at 487 (footnote omitted).

This notion of the individual's interest in the protection of trade secrets and confidential business information is intimately tied to the fact that these types of information are protectable forms of property[3] which are as entitled to protection from misappropriation as the tangible product whose manufacture they make possible. The trade secret, patent, trademark, copyright and unfair competition laws all embody a respect for the property interest which a business or individual has in its formula, design or process, and are designed to protect that interest from infringement, whether direct or illicit.

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[3] *See United States v. General Motors*, 323 U.S. 373, 377-78 (1945). *See also* Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967), at 34, where the Attorney General recognized that "formulae, designs, drawings, research data, etc., which though set forth on pieces of paper, are significant not as records but as *items of valuable property.*" (Emphasis added) As to such information, the Attorney General's Memorandum said: "There is no indication . . . that the Congress intended . . . to give away such *property* to every citizen or alien who is willing to pay the price of making a copy. Where similar *property* in private hands would be held in confidence, such *property* in the hands of the United States should be covered under exemption . . . (4)." *Id.* (emphasis added).

These related principles clearly evidence that "[a] national policy exists which protects confidential business information." *USS-OCF-W&M* v. *Eckerd*, No. 76-1933 (D.D.C., Dec. 9, 1976). The protective umbrella of this policy covers such information not only while in private files, but also when furnished by businesses to the federal government for limited regulatory purposes. Thus, as Mr. Justice Marshall observed in *Kewanee*, "Congress has in a number of instances given explicit federal protection to trade secret information *provided to federal agencies. See, e.g.*, 5 U.S.C. § 552(b)(4); 18 U.S.C. § 1905 . . ." *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. at 494 (emphasis added). These and other statutes reflect that confidential business information which would otherwise be protected from misappropriation is not stripped of that protection merely because it is furnished to a government agency for some specific regulatory purpose.

2. The information at issue in this case is precisely the type of information which has traditionally been protected by these confidentiality laws from misappropriation or impairment. The documents contain highly detailed statistical and narrative data which show the composition, deployment and utilization of the labor forces in two of Petitioner's automobile assembly plants. This information represents a significant part of the "know how" which Petitioner has developed in the automobile industry over the years as a result of research, innovation, experimentation, and the investment of great sums of money; it reflects the manner in which Petitioner deploys its labor force to obtain the highest quality assembly of the greatest number of vehicles at the lowest possible cost; and it reveals those unique aspects of Petitioner's assembly process—including its deployment of personnel, types of equipment, and assembly techniques—which set it apart, for good or for bad, from its competitors. Such

information, as the district court found, is not available to Petitioner's competitors through any source other than these documents (Pet. App. B, pp. 50a-51a) and, if disclosed, could cause substantial competitive injury to Petitioner (Pet. App. B, pp. 51a-52a).

The point of this discussion is not to reargue the factual issues of this case but, rather, to illustrate to the Court the type of highly valuable information which Petitioner, like countless other government contractors and regulated businesses, must submit to federal agencies on a recurring basis.[4] The fact that this data is submitted for the purpose of demonstrating Petitioner's compliance with equal employment requirements and not because the Government "wants to know how to make automobiles" (Resp. Br. 29) does not mitigate the considerable competitive injury which public disclosure of this information will cause. Nor does the fact that essentially private documents may have "public aspects" (Resp. Br. 30) obviate the prejudicial effects of, or warrant, disclosure of such information.[5] For, shorn of any official labels or titles which may be attached to these documents under Respondents' regulations, they are in fact a detailed handbook of Petitioner's labor deployment, one of the most technical and secret aspects of its automobile assembly process, which has been developed by Petitioner "at the cost of enterprise, organization, skill, labor, and money." *International News Service* v. *Associated Press,* 248 U.S. 215, 236 (1918). Moreover, regardless of the reason why

[4] See Briefs Amicus Curiae of Scientists & Engineers For Secure Energy *et al.,* at 2-6; Standard Oil Company of California, at 2 and Appendix; Chamber of Commerce of the United States, at 4-6; and National Security Industrial Association, at 3-6.

[5] The same might be said of an individual's or corporation's federal income tax return, the disclosure of which is forbidden by 26 U.S.C. § 7213(a).

Respondents collected the data in the first instance, the fact of the matter is that there are companies with whom Petitioner competes in the automobile and allied industries who are keenly interested in Petitioner's manufacturing techniques and who would, if they could obtain that data under the FOIA, utilize it to Petitioner's detriment.[6]

If one of Petitioner's competitors sought to obtain this or any comparable information from Petitioner's files by "improper means",[7] the trade secret and unfair competition laws would protect Petitioner from such a misappropriation of its property and invasion of its privacy. *Kewanee Oil Co.* v. *Bicron,* 416 U.S. at 175-76 & n. 5 and cases cited therein. Yet, the lower court's construction of the FOIA, and Exemption 4 in particular, turns this two century tradition on its ear by rendering freely available from government files some of the very same information which, absent Petitioner's consent, a competitor could not acquire without recourse to industrial espionage or other anticompetitive practice;[8] indeed, this fact has not been

[6] Likewise there are litigants who seek information under the FOIA which has been denied to them elsewhere by court order in discovery, who would also use such information to Petitioner's detriment. Pet. Br. 26-28. This Court recently observed "that FOIA was *not* intended to function as a private discovery tool, see *Renegotiation Board v. Bannercraft Clothing Co.,* [415 U.S. 1, 22 (1973)]." *NLRB v. Robbins Tire and Rubber Company,* 98 S.Ct. 2311, 2327 (1978). While that observation was made in a case involving use of the FOIA to obtain broader discovery of the agency's case than the agency's own discovery rules allowed, presumably use of the Act in circumvention of the Federal Rules of Civil Procedure or agency discovery rules in order to obtain otherwise nondiscoverable information relating to private persons is equally abhorrent.

[7] Restatement of Torts § 757(a) (1939).

[8] Allowing competitors and others to obtain Petitioner's business records indirectly from federal agencies when they could not obtain such information directly from Petitioner is contrary to the equitable maxim that courts should not allow by indirection what the law or its policy forbids from being done directly. *See Colonial Trust Company v. Goggin,* 230 F.2d 634, 637 (9th Cir. 1955).

overlooked as witnessed by the fact that industrial surveillance has become a principal use of the FOIA.[9] This result is as unnecessary as it is undesirable, in light of the fact that there are alternatives to disclosure of private business information which would satisfy the public's need to know and yet avoid the injury which disclosure of such information is likely to cause.[10]

This same notion compels the conclusion that agency reports or other documents "generated wholly within an agency *** [which] may be predominately or even exclusively reports on or copies of information submitted by private persons" (Resp. Br. 30 n. 16) should be withheld from disclosure to the same extent that the private information which they contain would be entitled to such protection.

[9] Pet. Br. 22-26. The so-called "public" disclosure of Petitioner's documents under the FOIA is in fact disclosure to individual persons, among them competitors, who seek that confidential business data for *private* use which will diminish, and in some cases destroy, Petitioner's interest in the documents. The expropriation of Petitioner's private property, for private purposes and without compensation, raises serious questions concerning this aspect of the FOIA under the Fifth Amendment. *See United States v. Basic Products Co.*, 260 F. 472, 482 (W.D.Pa. 1919); *Polaroid Corp. v. Costle*, No. 78-1133-S (D.Mass., June 22, 1978) (where the district court found a reasonable likelihood that the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*, which provides for disclosure of confidential information without affording the submitter notice or an opportunity for hearing and judicial review, constitutes an unlawful deprivation of property without compensation or due process of law). See Pet. Br. 24 n. 26.

[10] For example, a number of reports have been issued by the Department of Labor, by "watchdog" agencies and by Congress which objectively examine in detail the extent to which the affirmative action program pursuant to which Petitioner's documents were submitted is being properly administered, areas where enforcement has been lax, and steps which can be taken to improve the program. See, *e.g.*, Dept. of Labor, "Preliminary Report on the Revitalization of the Federal Contracts Compliance Program" (Sept. 1977); General Accounting Office, "The Equal Employment Opportunity Program for Federal Nonconstruction Contractors Can Be Improved", G.A.O. MWD-75-63 (April 29, 1975).

Similarly, where individual companies have failed to comply with regulatory requirements, procedures exist which bring such

The decision below undermines the balance struck by Congress by vesting in government bureaucrats the power to superimpose their own perception of the need for disclosure on Congress' and the States' judgment that our society will be benefited by maintaining the confidentiality of business data. For reasons ranging from agencies' lack of expertise in appraising the disclosability of assertedly confidential data (Pet. Br. 76-77), to the post-Watergate climate in which disclosure has become more expedient than withholding, the simple fact is that agencies too often have struck a balance which sacrifices the very same property and privacy rights which the trade secret and unfair competition laws were designed to safeguard and whose protection was deemed essential to the economic growth of the Nation.

It is in this broader perspective that it becomes apparent that, in including Exemption 4 in the FOIA, Congress did not intend to invest agencies with the day to day authority to vitiate the trade secret laws in the course of deciding whether to disclose materials which are clearly

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matters to public attention and allow for public participation in enforcement. For example, the names of contractors who have been determined to be in violation of applicable laws and against whom sanctions are proposed, the action to be taken, and decisions regarding such matters are published in the Federal Register. Executive Order 11246 § 209(a)(1).

Finally, where disclosure to the public of statistical data is desirable but where none of the alternatives noted above is feasible, the data can be released to the public in aggregate form in such a manner as to preserve the confidentiality of the individual company's information. This practice is uniformly followed by agencies such as the Department of the Census, the Bureau of Labor Statistics and the Bureau of Foreign and Domestic Commerce. See 13 U.S.C. § 9(a)(2); 15 U.S.C. § 176(a); and 29 C.F.R. § 2.4(a) and (b).

exempt from disclosure under Exemption 4.[11] Instead, as we explained in our opening brief, Congress itself permanently struck that balance when it enacted 18 U.S.C. § 1905 and affirmed it by including Exemption 4 in the FOIA.[12] Only by interpreting the fourth exemption in this manner so as to "assure" the confidentiality of trade secrets and confidential business information, can the Court effectuate the disclosure philosophy of the FOIA without doing violence to the principles underlying the business confidentiality laws.[13]

II. The Legislative History Of The FOIA And The 1974 Amendments Shows That Exemption 4 Was Intended To Assure The Confidentiality Of Trade Secrets And Private Business Information

Respondents argue that the legislative history of the Freedom of Information Act and of the 1974 amendments to the Act reflects that the FOIA exemptions were intended to be "permissive" in nature. Resp. Br. 18-27. This assertion reveals Respondents' misunderstanding of what records the Act was, *and was not,* intended to expose

[11] *See Lee Pharmaceuticals v. Kreps,* 577 F.2d 610, 617 (9th Cir. 1978) ("Absent the clearest of congressional direction, we would not attribute to Congress an intent to undercut the patent system and to vitiate protections uniformly provided since the institution of patent application procedures, in the guise of making the workings of government more open and accessible to the public.")

[12] "A central aim of the Freedom of Information Act has been to substitute legislative judgment for administrative discretion." *American Jewish Congress v. Kreps,* No. 75-1541 (D.C.Cir., March 15, 1978), Slip Op. at 9 n. 34; *see Lee Pharmaceuticals v. Kreps,* 577 F.2d at 614.

[13] And only by guaranteeing the confidentiality of such information can the Court ensure that businesses will continue to willingly furnish necessary information to government agencies. Pet. Br. 31-32. *See Sears, Roebuck & Co. v. EEOC,* 17 F.E.P. Cases (B.N.A.) 897, 902 (D.C.Cir. June 9, 1978); *Burlington Northern Co. v. EEOC,* 17 F.E.P. Cases (B.N.A.) 1358, 1360 (7th Cir. Aug. 15, 1978).

to public scrutiny, and distorts the content and significance of the legislative history of both the Act and the 1974 amendments.

A. The 1967 Legislative History Shows That Congress Intended Exemption 4 To Be Applied In A Mandatory Fashion

The Freedom of Information Act was intended to remedy the excessive withholding by federal agencies of information relating to agency actions. *Dept. of Air Force* v. *Rose,* 425 U.S. 352, 360-61 (1976). The Act was not designed to expose to public scrutiny confidential business information. Consequently, the main thrust of the Act, and the main subject of the legislative history, was the reversal of agencies' practice of shielding potentially embarrassing or incriminating *agency* information from disclosure.[14] It is understandable, then, that even though Congress recognized that some agency information should *not* be disclosed in certain circumstances, and that exemptions from disclosure were therefore necessary, the nondisclosure of such agency records was to be only discretionary, not mandatory; and, even where exempt, it was contemplated that agency information *would* be disclosed unless release would demonstrably impair government interests.

Congress' approach to the confidentiality of *private* documents is in marked contrast. While Congress sought to frame the FOIA exemptions in such a way as to restrict the extent to which agencies could shield agency information from disclosure merely by designating it as confidential, it did not intend or attempt to interfere with

[14] The language of the Act itself reveals that the FOIA's primary purpose was to inform the public about *agency* matters (i.e., agency organization, rules of procedure, policies, rulings, opinions, staff manuals, etc.). See 5 U.S.C. § 552(a)(1) and (a)(2).

legitimate claims of confidentiality on the part of businesses or other private persons. *See, e.g.,* 110 Cong. Rec. 17086-87 (July 28, 1964) (statement of Sen. Long). The bill which became the FOIA was presented by the House and Senate reports, and was understood by witnesses, as making no change in the treatment of documents submitted by private parties under a claim of confidentiality.[15] This is not surprising since the Act and Exemption 4 reflect "the national policy which . . . protects confidential business information *** compiled through an owner's efforts, skills, and resources" from disclosure. *USS-OCF-W&M* v. *Eckerd,* No. 76-1933 (D.D.C., December 8, 1976).

The legislative history of the Act and the exemptions reflects this dichotomy. When speaking of the exemptions in general—i.e., of an agency's judgment that an exemption should shield *agency* information from public disclosure—Congress indicated that the exemptions were intended to afford only limited protection and were to be sparingly invoked. *See, e.g.,* H.R.Rep.No. 1497, 89th Cong., 2d Sess. 7-10 (1966) ("H.R. Rep.No. 1497"), *reprinted in* [1966] U.S. Code Cong. & Adm. News 2418. However, when referring specifically to Exemption 4 and the protection which it was to provide to *private* business information which was confidential in nature, Congress' remarks were imperatives which indicated that such information *must* be protected from public disclosure. Pet. Br. 14-18; *see, e.g.,* H.R.Rep.No. 1497 at 10.

[15] The statements made during the course of the 1963 hearings on the bill which became the FOIA (which, at that point, contained no exemption for trade secrets or confidential commercial information) reflect that the witnesses sought absolute, not merely discretionary, protection from disclosure of confidential business information (Pet. Br. 15-16); and the addition of Exemption 4 in response to those statements shows that the Exemption was intended to be of a mandatory nature. See Resp. Br. 29 n. 15.

Thus, the 1967 legislative history referred to by Respondents, while possibly germane to the question of agency authority to disclose *agency* information which falls within an exemption, is inapposite to the issue of agency discretion to disclose *private* business information which falls within Exemption 4 because it is confidential in nature.[16] As to such information, the 1967 legislative history demonstrates that it was Congress' intent that the FOIA *assure* confidentiality.

B. The Legislative History of the 1974 Amendments Does Not Establish That Exemption 4 Must Be Applied In A Permissive Manner

Respondents seek to derive principal support for their argument that Exemption 4 is permissive in nature from the legislative history underlying the 1974 amendments to the Freedom of Information Act. Respondents' reliance on the 1974 amendments is misplaced for three reasons.

First, Respondents have referred the Court to statements which speak only generally of all of the FOIA exemptions, not specifically of Exemption 4. In this regard, it is important to recall the climate in which the 1974 amendments to the Act were passed. In the years following enactment of the FOIA in 1966, federal agencies showed their reluctance to apply the disclosure provisions

[16] Similarly, while the Attorney General's Memorandum referred generally to the need to disclose some exempt documents (Resp. Br. 22), its specific references to Exemption 4 and business information show that it too construed Exemption 4 in a mandatory fashion. Pet. Br. 17-18. Likewise, although this Court has recognized some discretion by federal agencies to disclose exempt *agency* documents and information (Resp. Br. 19 and cases cited therein), it has never suggested that, or considered whether, agencies have discretion to disclose confidential business information which falls within Exemption 4. See, *e.g., EPA v. Mink,* 410 U.S. 73 (1973), where the Court's remarks were rendered in the context of Exemption 1.

of the Act to agency information. *See* H.R.Rep.No. 92-1419, 92nd Cong., 2d Sess. 8-11 (1972). Consequently, when Congress considered the 1974 amendments, its focus was on, and its purpose was to reverse, the recalcitrant attitude of federal agencies in complying with the disclosure mandate of the FOIA. The statements relied upon by Respondents reflect Congress' opinion that the exemptions from disclosure applicable to *agency* information were only permissive, not mandatory, in nature and that, absent compelling reasons for withholding of such information, it would be contrary to the purpose of the FOIA for agencies to exercise their discretion to withhold such agency records. Nothing in the 1974 legislative history, however, shows any intent by Congress to reverse the longstanding policy, which was recognized in the 1967 legislative history and codified in Exemption 4 of the FOIA, of safeguarding the confidentiality of *private* business information compiled at private expense and furnished to the Government for limited regulatory purposes.

Second, statements in the 1974 legislative history do not constitute a part of Exemption 4's legislative history because they do not reflect Congress' intent *at the time Exemption 4 was enacted. Pet. Br. 18-19 & n.18. Where subsequent legislative action does not expressly affect the section of the statute under consideration,* "[*t*]*he views expressed by particular legislators as to the meaning of that* [*section*] *'cannot serve to change the legislative intent of Congress . . . since the statements were* [*made*] *after the passage of the Act.'* " *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 733 n. 14 (1977), *quoting Regional Rail Reorganization Act Cases,* 419 U.S. 102, 132 (1974). Here, although statements made during the course of the 1974 amendments to the FOIA may "give meaning to the [1974] amendments and their relationship to the statute" (Resp.

Br. 25), they do not affect the meaning of Exemption 4 because they did not expressly or implicitly address the question of whether *Exemption 4* was permissive or mandatory in nature. Moreover, to the extent the statements could be construed to address Exemption 4, since Congress undertook no amendment of the fourth exemption, those statements would, at most, constitute merely "the views of a subsequent Congress [and] form a hazardous basis for inferring the intent of an earlier [Congress]." *United States* v. *Paine,* 361 U.S. 304, 313 (1960); *Regional Rail Reorganization Act Cases,* 419 U.S. at 132.[17]

Finally, the fact that Congress did not amend Exemption 4 in the course of the 1974 amendments to the FOIA does not reflect, as Respondents assert (Resp. Br. 23-26), that Congress approved of a permissive construction of the fourth exemption. In enacting the 1974 amendments, Congress simply did not focus on this aspect of Exemption 4 or the related question of the disclosability of *private* business documents.[18] Thus, the 1974 legislative

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[17] The same may be said of the contention by Amici Consumer Federation of America ("CFA") *et al.* that Congress "endorsed" the *National Parks* test for FOIA Exemption 4 (see *National Parks and Conservation Assn. v. Morton,* 498 F.2d 765 (D.C. Cir. 1974)) by adopting the same exemption in the Government in the Sunshine Act, Public Law No. 94-409, 90 Stat. 1241 (1976). Amici Br. 15 n. 21; see Pet. Br. 19 n. 19. References in the legislative history of the Sunshine Act to congressional "recognition of judicial interpretation" of the fourth exemption to the FOIA are hardly dispositive of the intent of Congress in enacting Exemption 4 over ten years earlier. Moreover, the most recent discussion of the *National Parks* test by the House Committee on Government Operations does *not* endorse, much less ratify, the *National Parks* test. *See* H.R.Rep.No. 95-1382, 95th Cong. 2d Sess. 21-22 (1978).

[18] An amendment of Exemption 4 was proposed in the House in response to criticism that the relationship of the compound elements of Exemption 4 ("commercial or financial", "obtained from a person", and "privileged or confidential") was difficult to understand. *See,* Administration and Operation of the Freedom of Information

history, while pertinent to other sections of the FOIA,[19] provides no basis to impute approval by Congress of any mode of applying Exemption 4, whether mandatory or permissive.[20] Moreover, even if Congress' failure to amend Exemption 4 in 1974 reflected approval of the manner in which the Exemption was being applied, it would not be

Act, Hearings Before the House Comm. on Gov't. Operations, Subcomm. on Foreign Operations and Gov't. Information, 92nd Cong., 2d Sess., Part 4 at 1077, Part 5 at 1436, Part 6 at 1849, 2156 (1972). The amendment was later killed because of Congress' conclusion that this aspect of Exemption 4 was being correctly construed by the courts. *See* S.Rep.No. 93-854, 93rd Cong., 2d Sess. 7 (1974) ("S.Rep.No. 93-854"). The proposed amendment, and Congress' conclusion that it was unnecessary, bore no relationship to the question of whether Exemption 4 was mandatory or permissive in nature.

[19] Most of Congress' remarks concerning the permissive nature of the exemptions were made in the course of amending Exemption 1. That exemption, which relates to disclosure of classified information, clearly was designed to protect governmental, not private interests, thereby accounting for its permissive nature. *See, e.g.*, S.Rep.No. 93-854 at 6.

[20] The decisions of this Court cited by Respondents (Resp. Br. 24-26) are to the same effect. For example, in contrast to this case, the Court was presented with an entirely different situation in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), where "Congress [had] not just kept its silence by refusing to overturn the administrative construction, but [had] ratified it with *positive legislation.*" *Id.* at 381-82 (footnote omitted) (emphasis added). Here, in contrast, there was no "[s]ubsequent legislation declaring the intent" (*id.* at 380) of Congress with respect to Exemption 4, nor even any legislative history expressly addressing the Exemption; there was only congressional silence.

Likewise, in *FAA Administrator v. Robertson*, 422 U.S. 255 (1975), which dealt only with Exemption 3, the Court simply found no intention by Congress in the 1974 amendments to the FOIA to depart from its original intent as to Exemption 3. In this case, however, Respondents argue that post-Act statements should be read to support a permissive construction of Exemption 4 which radically departs from Congress' original intent, as expressed in the 1967 legislative history, that the fourth exemption *guarantee* confidentiality.

clear whether it was approving a permissive or a mandatory approach for, at the time of the 1974 amendments, some courts were applying Exemption 4 on a mandatory basis (*e.g., Westinghouse Electric Corp.* v. *Schiesinger*, 392 F.Supp. 1246 (E.D.Va. 1974)). Consequently, the original intent of Congress in 1967 should govern.[21]

III. Disclosure Of Petitioner's Documents Pursuant To OFCCP Regulations Will Violate 18 U.S.C. § 1905

Since as early as 1864, Congress has recognized that laws granting government agencies the right to inspect private business records and premises impose a corresponding duty on the Government, its agencies, and their employees to prevent public dissemination of confidential commercial information,[22] which may to a large extent constitute "the great value of the business itself." 26 Cong. Rec. 6893 (1894) (remarks of Sen. Aldrich). 18 U.S.C. § 1905, like the three prior non-disclosure laws upon which it is based, reflects a congressional intent to provide *legal assurance* to businesses that the confidentiality of valuable commercial data supplied to the Government would not be breached. Pet. Br. 40-44.

Seeking to avoid the prohibition of § 1905, Respondents assert that Congress intended that agency regulations, which generally have the "force and effect of law", provide the requisite "authorization by law" to divulge confidential commercial information whose disclosure is otherwise prohibited by § 1905 (Resp. Br. 38-45); and that agency disclosure regulations issued under 5 U.S.C.

[21] *See United States v. Wise*, 370 U.S. 405, 411 (1962) ("Logically, several equally tenable inferences could be drawn from the failure of Congress to adopt an amendment . . .").

[22] *See* Revenue Act of 1864, ch. 173, §38, 13 Stat. 223; *Whalen v. Roe*, 429 U.S. 589, 605 (1977).

§ 301, Executive Order 11246 or the FOIA, properly limit the applicability of § 1905 (Resp. Br. 45-53). Respondents misperceive the history, scope and purpose of § 1905.

A. Agency Regulations Do Not Constitute Authorization "By Law" Within the Meaning of § 1905

1. The broad principle that agency regulations have the "force and effect of law"[23] does not, as Respondents profess (Resp. Br. 38), lead to the conclusion that agency disclosure regulations can undercut the contradictory statutory policy of nondisclosure expressed in § 1905. As the legislative history of § 1905 demonstrates, Congress did not, in the specific context of 18 U.S.C. § 1905, equate authorization "by law" with authorization "by regulation." Pet. Br. 45-47.

This fact is apparent from a review of the various enactments of Rev. Stat. § 3167, the original income tax non-disclosure law on which § 1905 was, in part, based.[24]

[23] Respondents' reliance on *General Services Administration v. Benson*, 415 F.2d 878 (9th Cir. 1969), and other authorities cited at Resp. Br. 38 n. 24, is misplaced. Those cases deal with the *general* status of agency regulations and do not involve the issue of whether agency regulations constitute "authorization by law" *within the context of §1905*. Likewise, the cases cited by Respondents at nn. 22 & 23 and the accompanying text of their brief in fact confirm that, although non-agency directives to disclose—such as a specific statutory direction or judicial order—do constitute authorization "by law" under §1905, agency regulations do not. Pet. Br. 45-46. This is because recognition of agency disclosure regulations as a source of "authority" under §1905, absent an express statutory direction by Congress that the agency may disclose such documents, would be tantamount to making the goat the keeper of the cabbage patch. Pet. Br. 43-44 & n. 49.

[24] In its opening brief, Petitioner pointed out that the 1878 amendment to another revenue provision, Rev. Stat. §3165, permitting revenue agents to administer oaths "where such oaths are

Section 3167 provided the basis both for § 1905 and for 26 U.S.C. § 7213(a) (1954), the latter of which prohibited disclosure of income tax returns "in any manner whatever not provided by law". Although, as Respondents note, courts construed § 7213(a) to permit disclosure of income tax returns pursuant to agency regulations (Resp. Br. 43), those authorities lend no support to Respondents' argument; for Respondents have overlooked the fact that Congress has, in another *statute* (26 U.S.C. § 6103(a)), expressly authorized the Secretary of the Treasury to promulgate regulations governing inspection of the tax returns whose disclosure is otherwise prohibited by § 7213(a).[25]

authorized by law or regulation authorized by law to be taken", indicates that the contemporaneously enacted authorized "by law" language in Rev. Stat. §3167 (the predecessor of §1905) was intended to exclude agency regulations. Pet. Br. 44-45. Respondents contend that the change in Rev. Stat. §3165 was intended only to make clear the Commissioner's power to issue regulations. Resp. Br. 40-41 n. 25. In fact, as the remarks of Rep. Scales reveal, the Commissioner's power to issue regulations was virtually unquestioned: "[H]is power to make regulations in regard to these revenue laws is almost unlimited." 7 Cong. Rec. 4006 (1878). Moreover, the legislative history of §3165 demonstrates that the 1878 Congress expressly recognized the distinction between authorization "by law" and authorization by regulation, as the following colloquy reveals:

> Mr. Scales. "Is not the collector authorized by law to take oaths under the *law* as it is now?
>
> Mr. Tucker. "Under the *law*, but *not under the regulations* of the Department . . ." *Id.* (emphasis added).

[25] Respondents inaccurately state that Congress amended §7213(b) in 1976. Resp. Br. 43-44 n. 30, *citing* Pub.L. 94-455, Title XII, §1202(h)(3). Congress did not amend §7213(b) but did amend §7213(a)(1), prohibiting disclosure of income tax returns "except as authorized in this title." Pub. L. 94-455, Title XII, §1202(d). However, this amendment does not demonstrate, as Respondents suggest, that the prior terminology of §7213(a)(1) (authorized "by law") included authorization by "regulation." Resp. Br. 43-44 n. 30. For, Respondents have ignored the fact that even prior to the 1976 amendment, §7213 contemplated disclosure pursuant to agency regulations *only* to the extent that those regulations were specifically

Other statutory enactments subsequent to the codification of § 1905 in 1948 similarly reflect that Congress intended that, absent express statutory direction, agency regulations could not constitute authorization "by law" for disclosure of information falling within the scope of § 1905. Since 1948, Congress has passed numerous statutes which identify various documents whose disclosure is prohibited as provided in § 1905.[26] In contrast, during that period Congress enacted some other statutes which specifically "authorize" agencies to disclose information otherwise protected by § 1905 if necessary to protect the "public health and safety."[27] These statutes, like Rev. Stat. § 3167, reveal that where Congress has intended to authorize an agency to disclose documents which fall within § 1905, it has done so only by *express* statutory direction. There is no such authorization for Respondents' release of Petitioner's documents or for the regulations pursuant to which the threatened action was to occur.

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authorized by Congress in 26 U.S.C. §6103, and not disclosure pursuant to regulations promulgated under general agency rulemaking authority. See 26 U.S.C. §6103 (1954). The 1976 amendment to §7213, which provided for disclosure "as authorized in this title" did not signal a new restriction on the Treasury Secretary's general rulemaking authority, but only added a specific cross-reference to the more precise delineation of the Secretary's authority to disclose which Congress included in amending §6103. See Pub. L. 94-202, §8(g), 89 Stat. 1139 (1976). Consequently, the change in §7213(a)'s terminology was only cosmetic and, contrary to Respondents' contention, shows that Congress intended that regulations constitute authorization by law *only* when those regulations were *specifically* provided for by statute.

[26] See, *e.g.*, 15 U.S.C. §§1401(e), 1193(c), 1914(b), 1944(f), 1990d(d) and 2055(a)(2); 33 U.S.C. §1322(g)(3); 42 U.S.C. §4912(b); 46 U.S.C. §1463(b); and 49 U.S.C. §1681(d).

[27] See, *e.g.*, 15 U.S.C. §§1402(d), 1418(a)(2)(B) and 2217; 42 U.S.C. §263g(d); and 49 U.S.C. §1905(b).

2. Respondents concede that the Department of Labor has, in 29 C.F.R. § 70.21(a), directly applied § 1905 to its officers, employees and agents.[28] Resp. Br. 43 n. 29. However, they argue that § 1905 has no impact whatsoever on *agency* disclosure policies but was instead merely intended to protect the public from abuses by unscrupulous and profiteering government employees. Resp. Br. 39-44.

Respondents' argument ignores the fact that two of the three preexisting nondisclosure laws on which § 1905 is based were directly applicable to formal agency action.[29] Moreover the fact that § 1905's sanctions cannot be

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[28] Amici CFA *et al.* contend that despite §1905's clear and precise terminology, the statute should be deemed to apply only to those materials which fall within the scope of the three preexisting nondisclosure laws on which §1905 was based. Amici Br. 20-31. Amici's argument is without merit. Amici's contention that §1905, a codification of prior laws, precludes disclosure only of income tax returns, or statistical information submitted to the Tariff Commission and Commerce Department, rests on the assumption that Congress in enacting §1905 "inadvertently" and "unintentionally" drafted a plainly worded statute whose literal meaning must be disregarded in favor of the much narrower construction which Amici urge. Apart from attributing to Congress extreme ineptness in legislative drafting, Amici's position overlooks the facts that two of the predecessor statutes on which §1905 was based clearly applied to much broader categories of information; that courts have applied §1905 to a broader array of information than merely those mentioned by Amici (*see, e.g., FCC v. Cohn,* 154 F.Supp. 899 (S.D.N.Y. 1957)); and that §1905 has been treated by this Court as applicable to the employees of the United States or of *any* department or agency of the United States, not just those of the agencies to which the predecessor statutes applied. *St. Regis Paper Company v. United States,* 368 U.S. 208, 219 (1961).

[29] 15 U.S.C. § 176a (1940); 19 U.S.C. §1335 (1940). While Respondents concede that the Commerce Department statute imposed restrictions directly on the agency, they assert that, unlike the other two preexisting nondisclosure laws, the Commerce statute contained no criminal penalties (Resp. Br. 42). This contention is erroneous. 15 U.S.C. §176b (1940) provided that any employee of the Bureau of Foreign and Domestic Commerce who violated §176a

imposed directly on a federal agency does not relieve the agency of its responsibility to ensure compliance with the statutory mandate of nondisclosure, as both courts and Congress have recognized.[30] Factors such as these have led the Attorney General on two separate occasions to conclude that 18 U.S.C. § 1905 imposes restraints upon formal agency action. Pet. Br. 39 n. 45.

B. Neither 5 U.S.C. §301, The FOIA Nor Executive Order 11246 Provides Authority For Adoption Of Agency Regulations Limiting The Applicability of § 1905

Event if appropriate agency regulations could authorize disclosure of materials within the scope of 18 U.S.C. § 1905, neither 5 U.S.C. § 301, Executive Order 11246, nor the FOIA authorizes the adoption of disclosure regulations such as OFCCP's which are in derogation of § 1905 and FOIA Exemption 4. Pet. Br. 47-55.

1. 5 U.S.C. § 301 was originally enacted to enable agencies to promulgate regulations necessary to carry out their day-to-day activities. When Congress amended §301

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was to be deemed guilty of a misdemeanor and subject to a $1,000 fine upon conviction.

Respondents also assert that Rev. Stat. §3167, 18 U.S.C. §216, one of §1905's predecessors, was intended only to prevent abuses by "poorly paid revenue agents." (Resp. Br. 40 n. 26). However, the 1894 debates, viewed in their entirety, reflect explicit congressional intent to protect the value of the *information* itself, not merely to curb the venality of revenue agents.

[30] See *FCC v. Cohn*, 154 F. Supp. 899 (S.D.N.Y. 1957) where, in barring *the FCC* from disclosing a variety of business information found to be within the scope of 18 U.S.C. §1905, the court necessarily concluded that §1905 operates as a restraint on *agency* action. Similarly, the numerous statutes enacted subsequent to 18 U.S.C. §1905 which require *agencies* to preserve the confidentiality of information falling within the scope of §1905 reveal that Congress has expressly assumed that §1905 is directly applicable to agency action. See n. 27 and accompanying text, *supra*.

in 1958 to prevent the use of agency "housekeeping" authority to improperly withhold documents from Congress and the public, numerous legislators took pains to point out that the proposed amendment would not affect the right or the *duty* of agencies to withhold from the public information which Congress, in some 78 other statutes (including §1905), had declared was not to be disclosed. Pet. Br. 49. These were not, as Respondents suggest, isolated views of a few legislators; rather, as the 1958 debates reveal, they reflect the "sense of the House" that the proposed amendment was not intended to permit agencies to disclose information whose availability was otherwise limited by statute.

For example,[31] in addressing the effect of the proposed amendment to § 301, Rep. Brown remarked:

> "It would *still be a violation of law* for any agency of Government or any Government official to make public any of the records for which secrecy is provided by any of some 78 separate statutes." 104 Cong. Rec. 6548 (1958) (emphasis added).

In the same vein, Rep. Cramer stated that the bill was not intended to permit

> "indiscriminate rummaging through of Government information . . . where Congress had declared it in the public interest to withhold this information. *** This bill writes no *new* rule for the Government agencies as to making available information which does not now exist . . ." 104 Cong. Rec. 6566 (1958) (emphasis added).

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[31] *See also* 104 Cong. Rec. 6558 (remarks of Rep. Fascell); *id.* at 6564 (remarks of Rep. Wright); *id.* at 6567 (remarks of Rep. May); *id.* at 15688 (remarks of Sen. Johnson).

And Rep. Fascell concluded that § 301 did not constitute an *independent* source of authority to disclose:

> "[T]he very purpose of the statute is to give the department head authority to regulate the conduct or operation of his department. It has nothing to do with, *it is separate and apart completely from the question whether or not information is or is not to be made available to a particular individual* . . . In other words, if [information] is available under *other law,* that is the criterion." 104 Cong. Rec. 6560 (1958) (emphasis added).[32]

In short, the sole objective of the 1958 amendment was to "neutralize" § 301 by returning it to the purpose for which it was originally enacted in 1789,[33] *not,* as Respondents contend, to reaffirm agency power to promulgate

[32] Respondents' reliance (Resp. Br. 52) on a statement by Rep. Fascell to the effect that a proffered amendment—which provided that §301 should not be construed to require agencies to make records available—would "raise the contrary presumption that [the agency] shall not have the right to make information and records available", 104 Cong. Rec. 6569 (1958), is misplaced. For, Respondents ignore Rep. Fascell's recognition that a record's "availability" must be determined by reference to "other law". 104 Cong. Rec. 6560 (1958).

[33] "This bill would return [§301] to what appears to have been the original purpose for which it was enacted in 1789. . . . The law has been called an office 'housekeeping' statute enacted to help General Washington get his administration underway by spelling out the authority for executive officials to set up offices and file Government documents. The documents involve day-to-day business of Government which are *not restricted under other specific laws* nor classified as military information or secrets of state." H.R. Rep. No. 1461, 85th Cong., 2d Sess. (1958), *reprinted in* [1958] U.S. Code Cong. & Adm. News 3352 (emphasis added).

disclosure regulations in derogation of a statutory prohibition on disclosure such as 18 U.S.C. § 1905.[34]

2. Executive Order 11246 is equally unavailing as a source of authority for the adoption of disclosure regulations in derogation of the clear statutory prohibition on disclosure contained in 18 U.S.C. § 1905; for executive orders, while generally having the "force and effect of the law", do not provide blanket authority for regulations or actions which are in conflict with contradictory congressional expressions.[35] Moreover, the fact is that § 401 of Executive Order 11246 explicitly restricted the authority of

[34] The power which Respondents assert under §301 has not received the broad, historical support which Respondents, like the court below, attribute to this Court's decisions in *FCC v. Schreiber,* 381 U.S. 279 (1965), *Isbrandtsen-Moller Co. v. United States,* 300 U.S. 139 (1937), and *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294 (1933). Resp. Br. 49. As Petitioner noted in its opening brief, none of these decisions directly considered whether §301 constituted a basis for promulgation of regulations permitting disclosure of information *within the scope of 18 U.S.C. §1905* (Pet. Br. 51 n. 54); in fact, the disclosures involved in *Schreiber* and *Norwegian Nitrogen Products* were held permissible under specific statutory authority contained in the agencies' enabling statutes, *not* §301 which applies only to executive departments listed in 5 U.S.C. §101. Moreover, in *Schreiber,* the Court did not consider whether the FCC rules would authorize disclosure otherwise prohibited by §1905; indeed, the party requesting confidential treatment did not even claim that the information fell within §1905. Nor did the Court consider that issue even implicitly in either *Norwegian Nitrogen Products* or *Isbrandtsen-Moller.* And, in *Schreiber,* the Court ruled only that the agency could disclose "assertedly" confidential documents as to which no evidence, but only a "naked assertion of possible competitive injury" (381 U.S. at 298), had been presented; indeed, the Court suggested that if it were shown that, as in this case, disclosure would cause competitive injury, the agency's authority to disclose would be circumscribed. *Id.* at 296.

[35] Pet. Br. 54-55 & n. 60; *see Weber v. Kaiser Aluminum & Chemical Corp.,* 563 F.2d 216 (5th Cir. 1977) (Executive Order 11246 cannot sanction what Congress, in §703(d) of Title VII of the Civil Rights Act, has prohibited).

the Secretary of Labor to delegate to OFCCP his authority "to promulgate rules and regulations of a general nature"; therefore, OFCCP's disclosure rules, which expressly purported to be "issued pursuant to the general rulemaking authority of the OFCC under Executive Order 11246" (38 Fed.Reg. 3193 (Feb. 2, 1973)), were invalid *ab initio.*[36]

IV. 18 U.S.C. § 1905 Is An Exempting Statute Within the Meaning Of FOIA Exemption 3

1. Because Petitioner believes that the Court will conclude that disclosure pursuant to agency regulations is not authorized by law under 18 U.S.C. § 1905, the question of whether § 1905 is an Exemption 3 statute is, contrary to Respondents' view (Resp. Br. 37 n. 21), of abiding importance and should be decided by the Court. Pet. Br. 55; Petition n. 33.

2. Amici CFA *et al.* argue that, "irrespective of the exact wording of Exemption 3" (Amici Br. 49), § 1905 can be applied through Exemption 3 to prohibit disclosure of confidential information *only* if the information is first found to be within FOIA Exemption 4. Amici's position is unsound in two respects. As Amici apparently concede, there is nothing in either the express language or the legislative history of Exemption 3 which reflects an intent to make the operation of 18 U.S.C. § 1905 or any other nondisclosure statute dependent upon the coverage of Exemption 4. *See Sears, Roebuck and Co.* v. *General*

[36] President Carter has recently amended §401 of Executive Order 11246 to remove this express limitation on the Secretary's power to delegate. See Executive Order 12086, 43 Fed. Reg. 46501 (Oct. 10, 1978). However, this amendment does not retroactively validate OFCCP's disclosure regulations, which were promulgated in 1973 in violation of §401's then-existing ban against delegation of authority to issue regulations of a general nature. *See Peters v. Hobby,* 349 U.S. 331, 346-47 (1955).

Services Administration, 553 F.2d 1378, 1384 (D.C. Cir. 1978).

Nor should such an intent be inferred from the mere fact that Exemption 4 applies to much of the same information whose disclosure is prohibited by 18 U.S.C. § 1905. As this Court has remarked, "the legislative history shows [that Congress] clearly did not undertake* * * to reassess every delegation of authority to withhold information which it had made before the passage of [the FOIA]." *FAA Administrator* v. *Robertson,* 422 U.S. at 265. Thus, in enacting FOIA Exemption 3, Congress simply did not consider the relationship between § 1905 and Exemption 4 and, therefore, cannot be deemed to have intended that § 1905 would apply only to information which is first found to fall within Exemption 4.[37]

3. All of these niceties aside, the basic fact is that since 1948, § 1905 has served as a bulwark against improper disclosure of trade secrets and confidential commercial information which are furnished by private persons to government agencies. In enacting the FOIA in 1966, Congress incorporated this and similar nondisclosure statutes into the Act by including Exemption 3. Pet. Br. 57. This was done not only to continue the longstanding protection of confidential business information which §1905 had afforded, but also to avoid the irreconcilably

[37] This is particularly true if Exemption 4 is to be narrowly construed under the standard articulated in *National Parks & Conservation Association v. Morton,* 498 F.2d 765 (D.C. Cir. 1974). See Pet. Br. 19 n. 19. For, some information whose disclosure is prohibited by the express terms of §1905 may not fall within the fourth exemption as construed in *National Parks.* If this narrow construction of Exemption 4 were permitted to restrict the applicability of §1905, that would amount to precisely the type of repeal by implication of a preexisting nondisclosure statute which Congress and this Court have stated was not intended in enacting the FOIA. Pet. Br. 52-53.

conflicting obligations of federal employees which otherwise would have arisen where the disclosure of business documents which did not fall within Exemption 4 was, on the one hand, required under the FOIA and yet, on the other hand, prohibited by § 1905. This result can be avoided, and the two statutes read in harmony, only by treating 18 U.S.C. § 1905 as an Exemption 3 statute.[38]

V. A Person Seeking To Enjoin Disclosure Of Trade Secrets Or Confidential Business Information Is Entitled To A Trial De Novo

Respondents do not contest that if, as Petitioner asserts, a right of action to enjoin disclosure can be implied under 18 U.S.C. § 1905 or FOIA Exemption 4, than a *de novo* trial should be held on the reverse FOIA plaintiff's claim of confidentiality. Pet. Br. 62-69; see Resp. Br. 56 n. 41. Instead, they argue that no private right of action can be implied under those statutes, that the reverse FOIA plaintiff's right of action arises only under the

[38] The contrary decision in *Crown Central Petroleum Corp. v. Kleppe,* 424 F. Supp. 744 (D. Md. 1976), is erroneous. In *Crown Central,* the district court relied upon a statement in a House Report on a *proposed* amendment to Exemption 3 which implied that 18 U.S.C. §1905 did not come within amended Exemption 3. But the amendment to Exemption 3 to which the House Report referred was quite different, in important respects, from the amendment finally adopted; indeed, subsection A of amended Exemption 3—which was included for the specific purpose of making clear that statutes which *mandate* confidentiality would come within the purview of amended Exemption 3 *even if* they did not include specific criteria by which to determine confidentiality (122 Cong. Rec. H7897 (daily ed. July 28, 1976) (remarks of Rep. Fascell))—was not added to the proposed legislation until *after* the House Report was issued and until *after* the bill had gone through a number of subsequent transformations. Pet. Br. 58-60. Consequently, the statement in the House Report, and any judicial decision based on it, are of questionable authority. *See* Note, *The Effect of the 1976 Amendment to Exemption 3 of the Freedom of Information Act,* 76 Colum.L.Rev. 1029, 1042 and nn. 76-78 (1976).

limited review provision of the APA, and that *de novo* review is not appropriate under 5 U.S.C. § 706(2)(F).

1. The most fundamental defect of Respondents' contentions is their denial of an implied right of action under 18 U.S.C. § 1905 and FOIA Exemption 4. As we showed in our opening brief (Pet. Br. 62-67), reverse FOIA plaintiffs such as Petitioner do in fact have an implied right of action to enjoin disclosure of documents which would contravene § 1905 and Exemption 4.[39] That right of action carries with it the right to a *de novo* trial.[40] Pet. Br. 67-69.

[39] Respondents' arguments against implication of a cause of action under §1905 and Exemption 4 are unpersuasive. Although §1905 will benefit the public (Resp. Br. 54), it is the owners of protected confidential business information for whose "*especial* benefit" the statute was enacted. *See Cort v. Ash,* 422 U.S. 66, 78 (1975). This, together with the fact that the criminal remedies provided by §1905 and the damages arguably available under the Tucker Act, 28 U.S.C. §1491, are incapable of restoring the confidentiality of data once disclosed and therefore powerless to repair the damage which disclosure would cause, makes "[t]he inference of a private right of action [to enjoin disclosure]. . . irresistible." *Texas & Pacific R. Co. v. Rigsby,* 241 U.S. 33, 40 (1961); *Cort v. Ash,* 422 U.S. at 79 n. 11.

Likewise, although the FOIA's express provision for an action to compel disclosure may suggest that Congress did not intend other means of enforcing the Act's *disclosure* provisions (Resp. Br. 34), that does not imply that Congress intended to restrict the means of enforcing the *nondisclosure* provisions of Exemption 4. *See Renegotiation Board v. Bannercraft Clothing Co.,* 415 U.S. 1, 20 (1973).

Finally, even if Exemption 4 or §1905, read separately, will not support a private right of action to enjoin agency disclosure of confidential business information, the two statutes *read together* will. *See National Association of Letter Carriers AFL-CIO v. Independent Postal System, Inc.,* 470 F.2d 265, 271 (10th Cir. 1972).

[40] The decisions of this Court cited at n. 88 of the brief of Amici CFA *et al.* are inapposite because those cases involved statutes where Congress had actually provided for "review" of *agency* decisions without indicating whether it was to be on the agency record or *de novo.* Here, in contrast, what is involved is a *de novo* determination of a right to the statutory protection afforded by Exemption 4 and 18 U.S.C. §1905, a decision involving no "review" of any agency action or discretion.

2. Even if no right of action can be implied under the nondisclosure statutes, a reverse FOIA plaintiff is still entitled to *de novo* review of its claims that the documents to be disclosed are exempt form mandatory disclosure because they fall within Exemption 4 and that disclosure of the documents is prohibited by 18 U.S.C. § 1905. For, in making those determinations, the trial court is not reviewing agency action or discretion; rather, it is independently determining the applicability of the nondisclosure statutes to the documents. Under these circumstances, there is no occasion, as Respondents suggest (Resp. Br. 57 & n. 42), to defer to agency expertise and no reason to rely on an agency record. Pet. Br. 69-71. This is true in large part even if, as Respondents argue (Resp. Br. 57), Exemption 4 is permissive in nature. Pet. Br. 72.

3. Respondents assert that the agency procedures employed in making disclosure decisions are not so inadequate as to render *de novo* review necessary under 5 U.S.C. § 706(2)(F). Resp. Br. 58. Yet, Congress has recently received testimony from federal agencies and commentators which uniformly states that the time period provided in the FOIA is not adequate to permit agencies to engage in the necessary factfinding and decision-making process to resolve cases involving disputed requests for disclosure of business information. Pet. Br. 74-76. That inability is not unique to this case but, rather, is systemic[41] and compels the conclusion that, regardless

[41] Remand to the agency for additional factfinding is not a sound or desirable remedy, as Respondents argue (Resp. Br. 59, 60). This is because, as experience in this case and others demonstrates, countless reverse FOIA cases will have to be remanded for further agency factfinding due to the inadequacy of the underlying administrative records. *See, e.g., General Dynamics Corp. v. Marshall,* 572 F.2d 1211 (8th Cir. 1978); and the decision below, Pet. App. A 39a-40a. Moreover, because the inadequacy of the agency record on which we

of whether Congress approves of the FOIA time limit, *de novo* review is necessary because of agencies' inability to engage in necessary factfinding.[42]

This time limit, moreover, renders companies resisting disclosure unable to submit to the agency the same type and amount of information in support of their claim of confidentiality which they would present to a court in a *de novo* action which was not subject to the FOIA's ten-day time limit.[43] Similarly, while courts may be no more

focus arises not from the agency's arbitrary disregard of objections to disclosure or its refusal to consider them (Resp. Br. 29, 60) but, rather, from the *inability* of the company to prepare the objections and the agency to meaningfully review them in the ten-day period, challenge of the agency's decision under the arbitrary and capricious standard would not be productive of a decision as to whether the documents are confidential and ought not to be disclosed. These factors undercut all of the traditional reasons for limiting court review to the agency record and suggest that the interests of fairness and economy would best be served by deciding reverse FOIA cases in a single *de novo* trial in the district court.

[42] The time consuming element in deciding whether to disclose assertedly confidential documents is the process of determining whether the information is exempt from mandatory disclosure because its release would cause substantial competitive injury, not whether the agency should as a matter of discretion disclose information which has been found to fall within Exemption 4. Consequently, the fact that the agency could take more time to make the latter determination because the FOIA "does not apply" to exempt materials (Resp. Br. 58-59) does not obviate the fundamental problem—that the agency does not have enough time to engage in adequate factfinding to determine, in the first place, whether the documents are exempt, a determination which must be made within the time limits prescribed in the FOIA.

[43] The assertion of Amici CFA *et al.* that "neither the burden of developing legal and factual arguments regarding alleged confidentiality, nor the level of sophistication or technical expertise needed to assess those documents is particularly substantial" (Amici Br. 64), betrays either a remarkable degree of unfamiliarity with the types of information which are at issue in cases such as this, or a callous insensitivity to the injury which disclosure of such information can cause. *See Sears, Roebuck & Co. v. General Services Adminis-*

expert than agencies[44] in determining the disclosability of assertedly confidential documents, courts, in contrast to agencies, have the time to gather sufficient facts to support a reasoned disclosure decision. In these circumstances, the denial of a *de novo* trial amounts to denial of effective review.[45]

Finally, recognition of the right to a *de novo* trial in reverse FOIA actions is not inconsistent with the objectives of the FOIA. First, while the Act is basically a disclosure statute, Congress' interest in preserving the confidentiality of business information is clearly expressed; and, where documents fall within Exemption 4, the beneficiaries of that exemption ought to be allowed to protect their interests in a *de novo* proceeding. Second, Congress' rationale in providing for a *de novo* action for one who has been denied access to government information—that, absent *de novo* review, the person will be unable to prove that the agency's action was improper "because he will not

tration, 553 F.2d at 1382, where the court of appeals recognized both the complexity of the factual questions presented by an action such as this, and the resulting need for a *de novo* evidentiary proceeding in which those issues could be adequately examined; *and Exxon Corp. v. FTC,* No. 76-0812 (D.C. Cir., Oct. 19, 1978), where the court recognized the need for a judicial hearing prior to public disclosure of a trade secret. Slip. Op. at 11.

[44] Contrary to Respondents' assertion (Resp. Br. 60), the agency officials who make FOIA decisions often are largely uninformed concerning the operations of the industry or company involved in the FOIA request. For example, the agency officials who decided to disclose Petitioner's documents were trained in EEO compliance activities. They had no particular knowledge concerning the automobile industry, Petitioner's operations, or the economic disciplines necessary to make a determination of the consequences of disclosure, and they sought no such advice.

[45] Even if *de novo* review were not warranted, receipt of *de novo* evidence to augment the administrative record would be warranted where no administrative hearing or adequate alternative has been afforded. *Krawez v. Stans,* 306 F. Supp. 1230, 1233-34 (E.D.N.Y. 1969).

know the reasons for the agency action"[46]—is equally applicable to the need for *de novo* review in an action to prevent the wrongful disclosure of private information; this is particularly true in a case such as the instant one where the agencies would not even allow Petitioner to examine some of the materials which they intended to disclose.[47] And third, *de novo* review in reverse FOIA cases will not delay the release of information which is ultimately determined to be disclosable; for, as explained in our opening brief, *de novo* trial in reverse FOIA cases will generally be no more time consuming than review on the basis of the agency record.[48]

[46] H.R. Rep. No. 1497 at 9.

[47] See Stipulation of Facts and Issues 11 (Sept. 29, 1975); Letter, A. William Rolf, Chrysler Corp., to John S. Crandell, DSA (July 3, 1975), Pl's. Ex. No. 39; Letter, Robert F. Bowers, Chrysler Corp., to Oscar A. Peay, DSA (May 23, 1975), Pl's. Ex. No. 40.

[48] Where, as here, agency action based on an inadequate agency record or inadequate factfinding procedures will deny a person of, or destroy, his property, the statute must be read as authorizing *de novo* factfinding in the district court to provide full procedural due process and to "preserve the regulatory scheme from constitutional attack." *Cross v. United States,* 512 F.2d 1212, 1217 (4th Cir. 1975).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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